80-904

No.

Supreme Court, U. S.
FILED
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

VS.

DOROTHY MAE HALL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST APPELLATE DISTRICT OF THE STATE OF CALIFORNIA

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QUESTION PRESENTED

Whether the exclusionary rule compels suppression of evidence seized under a search warrant because a state magistrate has mistakenly concluded that the supporting affidavit furnished probable cause.

TABLE OF CONTENTS

	Page
Question presented	i
Opinion below	1
Jurisdiction	2
Constitutional provision involved United States Constitution, Amendment IV:	2
Statement of the case	2
A. Procedural history	2
B. Statement of facts	3
Reasons for granting writ	5
Argument	6
I	
The exclusionary rule does not require suppression of evidence seized under a judicial warrant based upon an affidavit which arguably establishes probable cause	6
Origins of present rule	6
Modern pragmatic approach	9
Conclusion	13

PREVIOUS PAGE WAS BLANK

TABLE OF AUTHORITIES CITED

Cases

	Page
Aguilar v. Texas, 378 U.S. 108 (1964)	3, 5, 6, 7, 8
Barnes v. Texas, 380 U.S. 253 (1965)	7
Brown v. Illinois, 422 U.S. 590	13
Coolidge v. New Hampshire, 403 U.S. 443 (1971)	8
Elkins v. United States, 364 U.S. 206 (1960)	8, 9
Hall v. Commonwealth, 121 S.E. 154 (Va. 1924)	8
Linkletter v. Walker, 381 U.S. 618 (1965)	9
Mapp v. Ohio, 367 U.S. 643 (1961)	8, 9, 11
In re Martinez, 1 Cal.3d 641, 83 Cal.Rptr. 382 (1970)	7
Michigan v. DeFillippo, 443 U.S. 31 (1979)	11, 12, 13
Michigan v. Tucker, 417 U.S. 433 (1974)	10, 12
Olmstead v. United States, 277 U.S. 438 (1927)	9, 10
People v. Kirk, 43 Cal.App.3d 921, 117 Cal.Rptr. 345 (1974)	5
People v. Moore, 31 Cal.App.3d 919, 107 Cal.Rptr. 590 (1973)	5
Riggan v. Commonwealth, 144 S.E.2d 298 (Va. 1965)	8
Riggan v. Virginia, 384 U.S. 152 (1966)	7
Spinelli v. United States, 393 U.S. 410 (1969)	3
State v. Gerardo, 250 A.2d 130 (N.J. 1969)	5
State v. Lien, 265 N.W.2d 833 (Minn. 1978)	5
State v. Smith, 558 P.2d 265 (Wash. App. 1976)	5
Stone v. Powell, 429 U.S. 465 (1976)	11, 12, 13
United States v. Calandra, 414 U.S. 338 (1974)	10, 11, 12
United States v. Janis, 428 U.S. 433 (1976)	10, 11, 12
United States v. Karathanos, 531 F.2d 26, cert. denied, 428 U.S. 910 (1976)	7
United States v. Peltier, 422 U.S. 531 (1975)	12
United States v. Ventresca, 380 U.S. 102 (1965)	5
Whitely v. Warden, 401 U.S. 560 (1971)	8, 9

TABLE OF AUTHORITIES CITED

Constitution

Page

United States Constitution, Fourth Amendment 2, 5, 6, 7, 11

Statutes

California Health and Safety Code, section 11351 2

California Penal Code, section 1538.5 2

28 U.S.C. section 1257(3) 2

Article 727a, VACCP (1925) 7

Texts

Barrett, Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan, 43 Calif. L.Rev. 565, 582 (1955) 10

Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L.Rev. 1027, 1036 (1974) 10

Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi. L.Rev. 665, 670 (1970) 9

Schrock and Welsh, Up From Calandra: The Exclusionary Rule, 59 Minn.L.Rev. 251, 265 (1974) 10

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THE PEOPLE OF THE STATE OF CALIFORNIA,
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vs.

DOROTHY MAE HALL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST APPELLATE DISTRICT OF THE STATE OF CALIFORNIA

The Petitioner, the People of the State of California, respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, First Appellate District, Division Three, entered on August 22, 1980. The California Supreme Court denied the People's petition for hearing on October 15, 1980.

OPINION BELOW

The opinion of the California Court of Appeal, First Appellate District, Division Three, appears as Appendix A to this petition.

JURISDICTION

The judgment of the California Court of Appeal became final as to that court on September 21, 1980. The California Supreme Court denied the People's petition for hearing on October 15, 1980. (See Appendix B.) This petition for writ of certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED UNITED STATES CONSTITUTION, AMENDMENT IV:

> "The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

A. Procedural History

By Information No. MCR 3513, filed in the Monterey County Superior Court on April 10, 1980, the District Attorney accused respondent Dorothy Mae Hall of possession of heroin for sale, in violation of California Health and Safety Code section 11351. Respondent Hall pleaded not guilty to the charge on April 23, 1980.

On April 30, 1980, Hall moved pursuant to California Penal Code section 1538.5 to quash a search warrant for her person and to suppress balloons of heroin seized from her by a police matron executing the warrant. On May 15, 1980, after a hearing, Hall's suppression motion was denied.

Hall then petitioned the California Court of Appeal, First Appellate District, for a writ of mandate setting aside the trial court's adverse order. On August 22, 1980, the California Court of Appeal, First Appellate District, Division Three, filed its opinion "directing the Monterey County Superior Court to vacate its order of May 15, 1980 denying petitioner's motion to suppress and to enter an order suppressing all evidence seized as a result of execution of the invalid search warrant." Appendix A-3. The sole basis for this ruling was the conclusion of the Court of Appeal that the magistrate had issued the warrant based upon a police affidavit which failed to satisfy the standard set forth in *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969). Appendix A-2.

The People's petition for hearing in the California Supreme Court was denied on October 15, 1980. Appendix B.

B. Statement of Facts

On March 5, 1980, Seaside Police Department Detective John Zimmerman presented to a judge of the Municipal Court for the Monterey Peninsula Judicial District his sworn affidavit containing the following averments:

> "Your affiant is a detective with the Seaside Police Department and has been a police officer for the past 6½ years, specializing in narcotics investigations for the past 2½ years. As such I have developed familiarity with local customs regarding the manner of processing, packaging, and preparing heroin for sale.
>
> "This date, 3-5-80 at approximately 9:30 A.M. I was contacted by a confidential informant, known to me from numerous past transactions to be a consistent

supplier of reliable information to myself as well as other police officers. The CI informed me that DOROTHY HALL, who is known to me as a persistent heroin dealer in the local area, is selling heroin on a daily basis from her place of employment at the Noche Buena School in Seaside, that she habitually stores the heroin which she has packaged for sale inside her bra, and further that she is presently in possession of heroin which will be available for sale in the above described location today, 3-5-80. CI stated that he last purchased heroin from HALL on Monday, 3-3-80, at Noche Buena School, and that HALL obtained the heroin she sold him from a plastic bag inside her bra. CI advised me that arrangements had been made whereby he, among others, will be able to purchase heroin directly from HALL today."

Based upon this affidavit, the magistrate issued a warrant authorizing the search of Dorothy Hall's person, accomplished on March 6, 1980, at the Seaside police station by matron Betty Farmer (PHT 11-12, 20-21). This search disclosed 48 balloons of heroin and currency (PHT 21, 14-15, 18-19).

Hall challenged the warrant affidavit at her preliminary examination; the magistrate (who did not issue the warrant) held the affidavit sufficient (PHT 33). Respondent next attacked the adequacy of the affidavit in the Monterey County Superior Court; the trial judge rejected her claim (RTS 4). Finally, Hall prevailed in the California Court of Appeal.

REASONS FOR GRANTING WRIT

The bulwark of the Fourth Amendment is the Warrant Clause. Accordingly, "'The entire thrust of the exclusionary rule and the cases which have applied it is to encourage the use of search warrants by law enforcement officials.'" *People v. Moore,* 31 Cal.App.3d 919, 927, 107 Cal.Rptr. 590, 595 (1973). Consistently, then, "The rule excluding evidence obtained by unconstitutional means was developed to deter *unlawful* police conduct. It has no reasonable application where police officers in good faith submit the question of whether they have probable cause for judicial evaluation." *People v. Kirk,* 43 Cal.App.3d 921, 925, 117 Cal.Rptr. 345, 347 (1974). Accord, *State v. Gerardo,* 250 A.2d 130, 133 (N.J. 1969); *cf. State v. Smith,* 558 P.2d 265, 268 (Wash. App. 1976). Suppression of evidence is self-defeating when the police do exactly what the Constitution commands: secure a warrant from a neutral, detached magistrate. Indeed, the oft-invoked "preference for warrants," see *United States v. Ventresca,* 380 U.S. 102, 109-110 (1965), may well arise from the perceived absurdity of excluding evidence not because a constable has blundered but because a magistrate has miscalculated. *State v. Lien,* 265 N.W.2d 833, 840 n.1 (Minn. 1978).

Petitioner challenges the existing judicial practice of suppressing evidence seized under a warrant issued without probable cause. This Court has never explained why exclusion is a relevant, much less necessary, sanction for erroneous determinations by state magistrates. To this day, *Aguilar v. Texas,* 378 U.S. 108 (1964), is a rule without a reason. This Court should not perpetuate a judicially created rule which, as will appear, began life as an accident,

matured into an unexplained assumption, and survives as an obstacle to the essential objective of the Fourth Amendment—to encourage resort to warrants—and to the central purpose of criminal trials—to determine the truth. Instead, the rule followed should be:

> A search warrant issued by a judicial officer may not be attacked on the basis of inadequate affidavit support unless procured by material misrepresentation or unless so lacking in the indicia of probable cause as to render reliance upon it wholly unreasonable.

This case presents an affidavit found sufficient by a magistrate who was both an attorney and a judicial officer, subsequently found adequate by two trial court judges, only to be held unconstitutional by an appellate court applying standards set down in this Court. There has been no claim that the affidavit contains any misrepresentation. It cannot be said that the magistrate who relied upon the affidavit acted unreasonably or that the officer who relied upon the warrant did not act in good faith. This case illustrates the need for a refinement of the Exclusionary Rule.

ARGUMENT

I

THE EXCLUSIONARY RULE DOES NOT REQUIRE SUPPRESSION OF EVIDENCE SEIZED UNDER A JUDICIAL WARRANT BASED UPON AN AFFIDAVIT WHICH ARGUABLY ESTABLISHES PROBABLE CAUSE.

Origins of Present Rule

This Court first reversed a state court judgment on the basis of a deficient search warrant affidavit in *Aguilar v.*

Texas, 378 U.S. 108 (1964). *Aguilar* has been widely accepted as authority for imposition of the exclusionary rule. See, *e.g.*, *United States v. Karathanos*, 531 F.2d 26, 33, *cert. denied*, 428 U.S. 910 (1976). *In re Martinez*, 1 Cal. 3d 641, 651 n.8, 83 Cal.Rptr. 382, 389 n.8 (1970). In fact, *Aguilar* did not impose the exclusionary rule either expressly or impliedly. The Court uttered not a single word on that subject because it was informed at page five of the Brief for Respondent that a Texas statute, Article 727a, VACCP, enacted in 1925, provided:

> "No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the United States or of this State shall be admitted in evidence against the accused on the trial of any criminal case."

This Court decided only that the affidavit failed Fourth Amendment standards. Evidence obtained pursuant to the warrant based upon that affidavit was excluded by state statute not constitutional compulsion. Application of the exclusionary rule was not before the Court, much less decided, in *Aguilar*.

Nevertheless, two years later the Court filed its brief *per curiam* order in *Riggan v. Virginia*, 384 U.S. 152 (1966), declaring:

> "The petition for a writ of certiorari is granted. The judgment is reversed. *Aguilar v. Texas*, 378 U.S. 108."[1]

---

[1]The Court had previously filed a similar summary reversal order in *Barnes v. Texas*, 380 U.S. 253 (1965). In light of the Texas statute, *Barnes* added nothing to *Aguilar*.

Aguilar was not authority for reversal, however, because Virginia, unlike Texas, admitted illegally seized evidence as a matter of state law. *Hall v. Commonwealth*, 121 S.E. 154 (Va. 1924), cited in appendix to *Elkins v. United States*, 364 U.S. 206, 232 (1960). This Court, like the state appellate court, simply assumed that *Aguilar* authorized suppression. *Riggan v. Commonwealth*, 144 S.E.2d 298, 301-302 (Va. 1965). In its pleading before this Court the Commonwealth did not suggest otherwise. Thus, without argument, without a hearing, without explanation and, apparently, without consideration, *Aguilar* was deemed authority for a rule it did not announce.

Five years later, in *Whitely v. Warden*, 401 U.S. 560 (1971), a divided Court again suppressed evidence seized by state officers under a warrant issued without probable cause. Again no explanation for exclusion was offered. This time, the single sentence ordering suppression was followed by a citation to *Mapp v. Ohio*, 367 U.S. 643 (1961), instead of a reference to *Aguilar*. Since *Mapp* was not a warrant case, it did not add to the Court's legal reasoning.[2] In fairness, it must be noted that the warden's nine-page brief did not suggest the inappropriateness of applying the exclusionary rule.

Whitely's reliance on *Mapp* was almost predictable since the *Mapp* plurality did declare, "We hold that all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court." 367 U.S. at

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[2]Ironically, *Whitely's* author would have overruled *Mapp*. *Coolidge v. New Hampshire*, 403 U.S. 443, 490 (1971) (concurring opinion of Mr. Justice Harlan).

655. As applied to warrant cases, of course, the quoted language is *dictum*. That the *dictum* was followed in *Whitely* is ultimately traceable to the fact that "The discursive prevailing opinion in *Mapp v. Ohio* . . . does not clearly identify the primary basis for the rule. . . ." Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U.Chi. L.Rev. 665, 670 (1970). The Court confronted the warrant cases before it clarified the fundamental purpose of the exclusionary rule: deterrence of police misconduct. Had the Court held that purpose firmly in mind when it decided *Whitely*, logical consistency would have required admission of the seized evidence.

Modern Pragmatic Approach

Confronted by such problems as the "silver platter" doctrine and retroactivity, the Court began to clarify the purpose of the exclusionary rule. First repudiated was the notion that exclusion was a remedy for an invasion of the accused's personal right of privacy. *Elkins v. United States*, 364 U.S. 206, 217 (1960); *Linkletter v. Walker*, 381 U.S. 618, 637 (1965).

Next dispatched was the "imperative of judicial integrity doctrine." A rhetorical success but an analytical failure, this doctrine has never been the sole basis for suppression of evidence. Oaks, *supra*, 37 U.Chi. L.Rev. at 669. Devised by Justices Holmes and Brandeis as a nonconsitutional justification for imposing the exclusionary rule before accumulated experience suggested the inadequacy of existing alternatives, the imperative of judicial integrity referred to public respect for the courts, not judicial self-respect. *Olmstead v. United States*, 277 U.S. 438, 466, 469-470, 479,

483-484 (1927). The doctrine fails for two reasons: (1) the court which excludes evidence to condemn police misconduct appears to condone the acts of the criminal, Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan,* 43 Calif. L.Rev. 565, 582 (1955); (2) the disparity in particular cases between the magnitude of the police error and the gravity of the unpunished crime deeply offends the public sense of justice and proportionality. Kaplan, *The Limits of the Exclusionary Rule,* 26 Stan. L.Rev. 1027, 1036 (1974). See also Schrock and Welsh, *Up From Calandra: The Exclusionary Rule,* 59 Minn. L.Rev. 251, 265 (1974).

The imperative of judicial integrity doctrine was undermined in *United States v. Calandra,* 414 U.S. 338 (1974), overturned in *Michigan v. Tucker,* 417 U.S. 433 (1974), and consigned to oblivion in *United States v. Janis,* 428 U.S. 433 (1976). In *Michigan v. Tucker* the Court characterized the imperative as "really an assimilation of the more specific rationales discussed in the text of this opinion, and does not in their absence provide an independent basis for excluding challenged evidence." 417 U.S. at 450 n.25.

Janis completely submerged the imperative within the deterrence rationale:

> "The primary meaning of 'judicial integrity' in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution. In the Fourth Amendment area, however, the evidence is unquestionably accurate, and the violation is complete by the time the evidence is presented to the court. See *United States v. Calandra,* 414 U.S. at

> 347, 354. The focus therefore must be on the question whether the evidence encourages violations of Fourth Amendment rights. As the Court has noted in recent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose."

428 U.S. at 458 n.35. Accord, *Stone v. Powell,* 429 U.S. 465, 485 (1976).

Having identified deterrence as its compelling justification, it was inevitable that this Court would refine the exclusionary rule. That process, begun in *Calandra,* proceeds apace. *Calandra* signalled a discriminating approach to suppression that is the antithesis to *Mapp*:

> "As with any remedial device, the application of the exclusionary rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."

414 U.S. at 348.

The trend of recent cases is summarized in *Janis*:

> "'[W]e simply decline to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served.' *Desist v. United States,* 394 U.S. 244, 254 n.24 (1969)."

428 U.S. at 454 n.28.

Thus, the Court refused to entertain Fourth Amendment claims on habeas corpus, reasoning that no significant additional deterrence would result. *Stone v. Powell,* 429 U.S. 465 (1976). *Michigan v. DeFillippo,* 443 U.S. 31 (1979), rejected suppression as an appropriate sanction for a search and seizure made incident to arrest under a statute

subsequently declared unconstitutional. In *United States v. Peltier*, 422 U.S. 531 (1975), the Court refused to exclude evidence discovered by searches which arguably complied with preexisting law.

> "If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

Id. at 542.

Peltier reiterated the reasonable, good faith standard for exclusion set down a year earlier in *Michigan v. Tucker*, 417 U.S. at 447:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

The inescapable logic of *Calandra*, *Tucker*, *Stone*, *Janis*, *Peltier*, and *DeFillippo* is that exclusion is an irrelevant sanction when evidence is acquired pursuant to a warrant issued by a judicial magistrate on the basis of an affidavit free of material misrepresentation. See *Stone v. Powell*,

429 U.S. at 498 (concurring opinion of Burger, C. J.); *Brown v. Illinois*, 422 U.S. 590, 609-612 (concurring opinion of Powell and Rehnquist, J. J.); *cf. Stone v. Powell*, 429 U.S. at 537 (dissenting opinion of White, J.). Why a police officer may rely upon the constitutional validity of a legislative enactment, *Michigan v. DeFillippo*, *supra*, but not upon a magistrate's determination of constitutional sufficiency remains a puzzle. That both questions are ultimately for judicial determination only heightens the mystery.

CONCLUSION

For the stated reasons, petitioner respectfully urges that the petition for writ of certiorari be granted.

Dated: November 24, 1980.

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(Appendices follow)

Appendix A

In the Court of Appeal of the State of California

First Appellate District, Division Three

1 Civil No. 49873
(Sup. Ct. No. MCR3513)

Dorothy Hall,
Petitioner,

vs.

Superior Court of the State of California, County of Monterey,
Respondent,

People of the State of California,
Real Party in Interest.

[Filed Aug. 22, 1980]

OPINION

Petitioner, the defendant in a prosecution for possession of a controlled substance for the purpose of sale (Health Saf. Code, § 11351), challenges trial court denial of her motion to suppress evidence. We have concluded that she is entitled to the relief requested. Her motion was improperly denied because the affidavit supporting the search warrant which led to discovery of contraband was defective.

Petitioner was arrested on March 6, 1980 in the City of Seaside, after Detective Zimmerman executed a search warrant issued the previous day. Concerning the source of his

information, the affiant, Detective Zimmerman, stated only: "I was contacted by a confidential informant, known to me from numerous past transactions to be a consistent supplier of reliable information to myself as well as other police officers." This is insufficient for the following reasons.

The *Aguilar-Spinelli* test sets forth two requirements for the sufficiency of a warrant based on an informant's hearsay statements: "The *Aguilar* [*Aguilar v. Texas* (1964) 378 U.S. 108 . . .]—*Spinelli* [*Spinelli v. United States* (1969) 393 U.S. 410 . . .] test is stated by *People v. Hamilton* (1969) 71 Cal. 2d 176, 179-180 . . . , as follows: '[F]or an affidavit based on an informant's hearsay statement to be legally sufficient to support the issuance of a search warrant, two requirements must be met: (1) the affidavit must allege the informant's statement in language that is factual rather than conclusionary and must establish that the informant spoke with personal knowledge of the matters contained in such statement; and (2) the affidavit must contain some underlying factual information from which the magistrate issuing the warrant can reasonably conclude that the informant was credible or his information reliable.'" (*People v. Schmidt* (1980) 102 Cal.App.3d 172 177.)

The problem with the affidavit in this case is that it is conclusionary and does not disclose the "underlying factual information" needed to establish the reliability of the informant. The language of the affidavit is no more than a bald recital of reliability. Nowhere are facts disclosed upon which a magistrate could make an independent determination that the informant had provided reliable information in the past.

In *Spinelli v. United States* (1969) 393 U.S. 410, 414, the affiant had declared he "'[had] been informed by a confidential reliable informant . . . .'" The United States Supreme Court held that this was not sufficient. Here, the only additional information provided by the affiant was that the informant was known to him from "numerous past transactions" and that he was a "consistent" supplier of reliable information. Nowhere are facts concerning the nature of the past information or the results flowing therefrom. Without such facts the magistrate could not independently assess the informant's reliability. He could only rely upon the conclusions of the affiant.

The Attorney General argues that added reliability is supplied by a later portion of the affidavit which mentions that the informant stated that he had purchased narcotics from petitioner on March 3, 1980. He asserts that these statements were made against the penal interest of the informant and that reliability inheres in that circumstance. (See *United States v. Harris* (1971) 403 U.S. 573; *Caligari v. Superior Court* (1979) 98 Cal.App.3d 725, 733-734.) We reject that argument. There is nothing in the affidavit to support the Attorney General's assertion that the prior purchase was an illegal act for which the informant could be prosecuted or to negate the possibility that the purchase of March 3, 1980 was a controlled police "buy."

We hold that the affidavit in support of the search warrant was insufficient and that the motion to suppress was improperly denied. We have reached this conclusion after a full briefing by the parties. Issuance of an alternative writ would only cause undue delay in the proceedings. We therefore issue a peremptory writ in the first instance.

(Code Civ. Proc., § 1088; *San Diego Wholesale Credit Men's Assn. v. Superior Court* (1973) 35 Cal.App.3d 458; *Goodenough v. Superior Court* (1971) 18 Cal.App.3d 692, 697.)

Let a peremptory writ of mandate issue directing the Monterey County Superior Court to vacate its order of May 15, 1980 denying petitioner's motion to suppress and to enter an order suppressing all evidence seized as a result of execution of the invalid search warrant.

White, P. J.

We concur:

Scott, J.

Feinberg, J.

Appendix B

Order Denying Hearing
After Judgment by the Court of Appeal

1st District, Division 3, Civil No. 49873

In the Supreme Court
of the
State of California

In Bank

[Filed Oct. 15, 1980]

Hall, Petitioner,

v.

The Superior Court of the County of Alameda, Respondent;
People, Real Party in Interest.

Petition of real party interest for hearing DENIED.

/s/ Bird
Chief Justice

MAR 23 1981

No. 80-904

In the Supreme Court
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OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

DOROTHY MAE HALL,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST APPELLATE DISTRICT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

The question as presented by the petitioner is:

> "Whether the exclusionary rule compels suppression of evidence seized under a search warrant because a State Magistrate has mistakenly concluded that the supporting affidavit furnished probable cause."

An accurate statement of the question presented is as follows:

> "Whether the exclusionary rule as adopted by the courts of the State of California compels suppression of evidence seized under a search warrant because a Magistrate has mistakenly concluded that the supporting affidavit furnished probable cause."

TABLE OF CONTENTS

	Page
Questions presented	i
Constitutional provisions	1
Statement of the case	2
A. Procedural history	2
B. Statement of facts	2
Reasons for denying writ	2
Argument	5
I	
The Federal Rules regarding the exclusion of evidence as it relates to invalid search warrants sets forth only a minimum standard which is applicable to states, and states are free, under their own constitutions and on independent state grounds, to promulgate stricter rules	5
II	
The exclusionary rule does require suppression of evidence seized under a judicial warrant based upon an affidavit which fails to establish probable cause due to the lack of showing of the reliability of an informant	8
Conclusion	11

PREVIOUS PAGE WAS BLANK

TABLE OF AUTHORITIES CITED

Cases

	Page
Aguilar v. Texas (1964) 378 U.S. 108	2, 8, 9
Byars v. U.S. (1924) 273 U.S. 28	10
Curry v. Superior Court (1970) 2 Cal.3d 707	6
Dunn v. Municipal Court (1963) 220 C.A.2d 858	7
Go-Bart Improving Co. v. U.S., 282 U.S. 344	10
Gouled v. U.S., 255 U.S. 303	10
Gustafson v. Florida, 414 U.S. 260 (1973)	6
Ker v. California, 374 U.S. 23; 10 L.Ed.2d 726	7
People v. Brisendine (1975) 13 Cal.3d 528	5, 6
People v. Cahan (1955) 44 Cal.2d 434	3, 5, 6, 8
People v. Hamilton (1969) 71 Cal.2d 176	2
People v. Keener (1961) 55 Cal.2d 714	7
People v. Kirk (1974) 43 Cal.App.3d 921	3
People v. Moore (1973) 31 Cal.App.3d 919	2, 3
People v. Schmidt (1980) 102 Cal.App.3d 172	2
Spinelli v. United States (1969) 393 U.S. 410	2
United States v. Robinson, 414 U.S. 218 (1973)	6

Constitutions

United States Constitution:

4th Amendment	1, 5, 6, 7, 8, 10
5th Amendment	10
14th Amendment	6

California Constitution:

Article 1, Section 13	2, 5, 6

TABLE OF AUTHORITIES CITED

Statutes

	Page
California Penal Code:	
Section 1525	7
Section 1538.5	7, 8
Section 1538.5(d)	8

Other Authorities

"California Supreme Court", 64 Calif. Law Review, page 442	7
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"Burger Court in the California Crystal Ball", Robert S. Thompson, 5 Southwestern University Law Review (1973), page 239	9

No. 80-904

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

DOROTHY MAE HALL,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST APPELLATE DISTRICT OF THE STATE OF CALIFORNIA

CONSTITUTIONAL PROVISIONS

Constitutional Provisions Involved United States Constitution, Amendment IV:

> "The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

California Constitutional Provisions Involved Are California Constitution Article 1, Section 13:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

STATEMENT OF THE CASE

A. Procedural History

Respondent accepts the statement of the procedural history insofar as it goes in the petition, however, the history is incorrect wherein it states on page 3, that the sole basis for this ruling was the conclusion of the Court of Appeal that the Magistrate had issued warrants based on a police affidavit which failed to satisfy the standards set forth in *Aguilar v. Texas,* (1964) 378 U.S. 108 and *Spinelli v. United States,* (1969) 393 U.S. 410.

The California Court of Appeal based its decision also on *People v. Hamilton* (1969) 71 Cal.2d 176 and *People v. Schmidt* (1980) 102 Cal.App.3d 172.

B. Statement of Facts

Respondent accepts the statement of facts as set forth in the petition.

REASONS FOR DENYING WRIT

The citation of *People v. Moore* (1973) 31 Cal.App.3d 919, 927, is taken entirely out of context. *People v. Moore* involved a clerical error in a search warrant; it did not in-

volve a total failure of the showing of the reliability of an informant as in the instant case. Petitioner also neglected the citation of *People v. Cahan* (1955) 44 Cal.2d 434, where the court in *Moore* on page 923 stated: "We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rules have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers." The court in *Moore,* still on page 923, went on to state: "In People v. Benford (1959) 53 Cal.2d 1, a pre-*Mapp* case, the court said, ". . .California bases exclusion of evidence obtained by unconstitutional search and seizure, not upon due process, but upon the court's 'regard for its own dignity as an agency of justice and custodian of liberty.'" (On page 15)

The quotes taken from *People v. Kirk* (1974) 43 Cal.App. 3d 921, 925, also on page 5 of the petition, are also taken out of context. In that case there was a warrant of questionable validity, however, the court did not have to decide that issue because the court held in *Kirk* that there were other facts disclosed by the evidence which gave the officers reasonable and probable cause to effect the arrest without a warrant.

Petitioner goes on to state what the rule should be as:

> "A search warrant issued by a judicial officer may not be attacked on the basis of inadequate affidavit support unless procured by material misrepresentation or unless so lacking in the indici of probable cause as to render reliance upon it wholly unreasonable."

To adopt such a rule would be to in effect completely change the wording of the constitution and it is certainly not warranted by any change in police conduct since the inception of the exclusionary rule.

Petitioner has not set forth any showing of the ineffectiveness of the exclusionary rule, and further, that anything has changed between the time of its inception and now which would necessitate any less protection of the citizens from over excessive governmental intrusions.

Petitioner further asserts that the affidavit was found sufficient by a Magistrate and two trial court judges which is incorrect, it was found sufficient by a Magistrate, who was not the issuing officer, and a single subsequent trial judge, and was then held to be unconstitutional by the Appellate Court applying not standards set down by the U.S. Supreme Court but by the courts of the State of California.

The allegation that it cannot be said that the Magistrate who relied upon the affidavit acted unreasonably is certainly open to question as is the conclusion of the petitioner that this case illustrates the need for refinement of the exclusionary rule.

The imperative of judicial integrity requires continued viability of the existing "Exclusionary rule" in federal courts and the U.S. Supreme Court should respect the obvious application of the independent state grounds upon which this case was grounded.

ARGUMENT

I

THE FEDERAL RULES REGARDING THE EXCLUSION OF EVIDENCE AS IT RELATES TO INVALID SEARCH WARRANTS SETS FORTH ONLY A MINIMUM STANDARD WHICH IS APPLICABLE TO STATES, AND STATES ARE FREE, UNDER THEIR OWN CONSTITUTIONS AND ON INDEPENDENT STATE GROUNDS, TO PROMULGATE STRICTER RULES

Article 1, Section 13 of the State of California states that a warrant may not issue except upon probable cause.

California Constitution Article 1, Section 13 requires a more exacting standard with respect to searches and seizures for cases arising in this state than the minimum standards required to satisfy the Fourth Amendment's proscription of unreasonable searches. *People v. Brisendine* (1975) 13 Cal.3d 528.

The exclusionary rule was first adopted in 1955 by the California Supreme Court in *People v. Cahan* (1955) 44 Cal.2d 434, on page 438 where it stated: "Thus both the United States Constitution and the California Constitution make it emphatically clear that important as efficient law enforcement may be, it is more important that the right of privacy guaranteed by these constitutional provisions be respected. Since in no case shall the right of the people to be secure against unreasonable search and seizure be violated, the contention that any unreasonable search and seizure is justified by the necessity of bringing criminals to justice cannot be accepted. It was rejected when the constitutional

provisions were adopted and the choice was made that all the people, the guilty and innocent alike should be secure from unreasonable police intrusions, even though some criminals should escape."

Contraband illegally seized in violation of Article 1, Section 13 of the California Constitution is inadmissible as evidence. *People v. Brisendine*, 13 Cal.3d 528, 545; *People v. Cahan, supra.*

The ability of state courts to formulate stricter standards than those required by the United States Supreme Court is beyond question; the Federal Bill of Rights as applied to the states through the Fourteenth Amendment guarantees a minimum of protection which a state court cannot abridge: ". . . it does not forbid a state from according a *greater* degree of such protection." (emphasis original) *Curry v. Superior Court* (1970) 2 Cal.3d 707, 716. See also California Declaration of Rights, Hastings Law Journal, Volume 26 (1974) "Rediscovering the California Declaration of Rights", page 481.

In *People v. Brisendine, supra,* the California Supreme Court held that it is not bound by the United States Supreme Court's interpretation of the Fourth Amendment in construing a substantially identical clause of the California Constitution barring unreasonable searches and seizure. In *Brisendine,* the court refused to follow the *United States v. Robinson,* 414 U.S. 218 (1973), and *Gustafson v. Florida,* 414 U.S. 260 (1973), and instead decided the case on the basis of the California Constitution. The significance of *Brisendine, supra,* involving the California Constitution as

independent state ground was discussed in an article in 64 Calif. Law Review page 442 entitled, "California Supreme Court".

The issue of probable cause for the issuance of the search warrants was decided in California long before Aguilar-Spinelli. In *People v. Keener* (1961) 55 Cal.2d 714, 721, the courts of California stated, probable cause for the issuance of a search warrant may be based on information furnished by an informant only if the supporting affidavit also recites the facts indicating that reliance of the information is reasonable.

Also in 1963 in *Dunn v. Municipal Court* (1963) 220 C.A. 2d 858, 871, California State Courts held that in order to give validity to a search warrant the affidavit in support thereof must state facts showing the informant was reliable.

The U.S. Supreme Court in *Ker v. California*, 374 U.S. 23; 10 L.Ed.2d 726, stated that state courts have the power to develop workable rules governing arrests, searches and seizures, to meet the practical demands of effective criminal investigation and law enforcement in the states, provided that those rules do not violate the Fourth Amendment's proscription of unreasonable searches and seizures, and the concomitant demand that evidence so seized is inadmissible.

The California Legislature has enacted its own statutory scheme for attacking search warrants, Penal Code Section 1538.5. In addition, Penal Code Section 1525 states that no warrant shall issue except upon probable cause; tested by that statute reliance on the affidavit was unreasonable.

Penal Code Section 1538.5(d) states:

> "If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissable against the movant at any trial . . ."

Thus, when the warrant was suppressed, the statute, Penal Code Section 1538.5(d), not the invalid warrant precluded the admissibility of the seized evidence.

II

THE EXCLUSIONARY RULE DOES REQUIRE SUPPRESSION OF EVIDENCE SEIZED UNDER A JUDICIAL WARRANT BASED UPON AN AFFIDAVIT WHICH FAILS TO ESTABLISH PROBABLE CAUSE DUE TO THE LACK OF SHOWING OF THE RELIABILITY OF AN INFORMANT

Petitioner's argument that *Aguilar v. Texas*, 378 U.S. 108 (1964) and other cases cited therein completely miss the point of *Aguilar*. In *Aguilar* the court held that the warrant was invalid because of the lack of the showing of reliability of the informant. Granted that there was evidence of a Texas statute excluding illegally seized evidence and the court here is certainly aware of *People v. Cahan*, *supra*, which held that illegally seized evidence shall not be admissible in the State of California.

The constitutional provision of the U.S. Constitution, the California Constitution and the penal code sections required that warrants be issued based upon probable cause. In the instant case it was held that there was no probable cause as it was the same as if there were no warrants whatsoever, therefore the evidence was illegally seized.

It seems illogical to state that *Aguilar* does not stand for the proposition that the exclusionary rule is applicable to search warrant cases when in fact the obvious result is when a warrant is issued with no probable cause it is the same as if no warrant has been issued in the first instance. Petitioner appears to concede that *Aguilar* dealt with a failure of the Fourth Amendment standard. Accordingly, it is a troublesome conclusion to state that the application of the exclusionary rule is not before the court nor decided by *Aguilar*.

In any event, California state law clearly makes evidence seized under an illegal warrant inadmissible whatever the situation may be in Texas.

The authorities cited by the Petitioner are certainly not recent in nature and all of them go back to arguments which have existed and which were in existence at the time the exclusionary rule was promulgated.

The exclusionary rule certainly still has vitality and whatever of its shortcomings, "It has made law enforcement agencies aware of constitutional rights and it has necessitated and therefore promoted, professionalism of the police function. There is more than ample evidence that the well arranged and operated and police and sheriffs' departments in California and peace officers, in no significantly lesser percentage than judges, are dedicated to following the law. While the deterred effect of the rule has perhaps been small, its educational and moral force has been great." "BURGER COURT IN THE CALIFORNIA CRYSTAL BALL", Robert S. Thompson, 5 Southwestern University Law Review (1973), page 239.

The argument that the purpose of the "exclusionary rule is deterrence was most probably promulgated during the 1960's. However, the rule was in existence long prior to the 1960's and was stated in 1921 by Justice Clark when he described the Fourth (and Fifth) Amendment as ". . . the very essence of constitutional liberty" and ruled that tainted evidence should be excluded to ". . . full enjoyment of personal liberty and private property." *Gouled v. U.S.*, 255 U.S. 303, 304.

In 1924 in *Byars v. U.S.*, 273 U.S. 28, 33, Justice Southerland argued that illegally seized evidence should be excluded because ". . . to hold (otherwise) would be to disregard the plain spirit and purpose of the constitutional prohibitions intended to secure the people against unauthorized official actions." Justice Butler in 1931, stated for the court in *Go-Bart Improving Co. v. U.S.*, 282 U.S. 344, 357, that government searches outside the Fourth Amendment are ". . .obnoxious to fundamental principles of liberty. . . ." and that courts ". . . owe the duty of vigilance of effective enforcement."

Query, then, whether deterrence was really the objective, or was rather to enhance constitutional liberty and to reassure the people that government lawlessness would not be rewarded by an independent judiciary. (See the "EXCLUSIONARY RULE: ITS NECESSITY IN CONSTITUTIONAL DEMOCRACY," Dr. Steven Cann and Bob Egbert, 23 Howard Law Journal (1980) 299.

Petitioner appears to be arguing a trend in the courts towards forever ridding the criminal justice system of the

exclusionary rule. It is submitted that such time, if it should ever come has not come as of this date.

Petitioner also argues eloquently that the deterrent purpose of the exclusionary rule is ineffective; it is submitted that it is not deterrence which is the essence of the exclusionary rule it is more a statement by the courts that they won't tolerate illegal conduct.

CONCLUSION

For the reasons stated above, Respondent respectfully urges the court to deny the Petition for a Writ of Certiorari requested herein.

Dated: March 13, 1981

JOSEPH F. LANDRETH
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No. 80-904

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REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
ARGUMENT	
THE DECISION BELOW IS BASED UPON THE FEDERAL CONSTITUTION.	1
CONCLUSION	4

TABLE OF CASES

	PAGE
Aguilar v. Texas 378 U.S. 108 (1964)	3
Herb v. Pitcairn 324 U.S. 117 (1945)	1
People v. Hamilton 71 Cal.2d 176 77 Cal. Rptr. 785 (1969)	3
People v. Newell 93 Cal.App.3d 29 155 Cal. Rptr. 430 (1979)	2
People v. Schmidt 102 Cal.App.3d 172 162 Cal. Rptr. 171 (1980)	3
Spinelli v. United States 393 U.S. 410 (1969)	3

TEXTS, STATUTES AND AUTHORITIES

	PAGE
United States Constitution Fourth Amendment	2
California Penal Code § 1538.5	2

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ARGUMENT

THE DECISION BELOW IS BASED UPON THE FEDERAL CONSTITUTION

Respondent seeks refuge in the independent state ground doctrine. He urges that the decision below is irreviewable in federal court because California has its own exclusionary rule, based upon state law decisions and state statutes. See Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945). More than

resting their decisions in whole or in part upon state law, insultated themselves from federal review. This is not such a case. The decision below does not mention the California Constitution. Not one word of the state court decisions cited below invoke the state constitution or state exclusionary rule. The decision below does not mention California Penal Code section 1538.5, much less construe it as a statutory exclusionary rule. "Nor is there such an absolute statutory right. Penal Code section 1538.5 is directed only toward implementation of such Fourth Amendment rights of an accused as he may have." People v. Newell, 93 Cal.App.3d 29, 36, 155 Cal. Rptr. 430, 432 (1979).

Nothing in the opinion below encourages the belief that the state court imposed more exacting standards than those demanded by the Fourth

Amendment. Instead, the opinion rests upon this Court's decisions in Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S.410 (1969), and upon two state court decisions which faithfully apply the guidance furnished in Aguilar and Spinelli. People v. Hamilton, 71 Cal.2d 176, 77 Cal. Rptr. 785 (1969); People v. Schmidt, 102 Cal.App.3d 172, 162 Cal. Rptr. 171 (1980).

The state appellate court excluded evidence obtained by a warrant search in the belief that suppression was required by the decisions of this Court. That the state court could have reached its decision under state law does not supply an independent basis for its decision. Otherwise state court opinions interpreting the federal Constitution would be illusions.

CONCLUSION

For the stated reasons, petitioner respectfully urges that the petition for writ of certiorari be granted.

DATED: March 25, 1981

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